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SUMMARY RECORD OF THE 585th MEETING

Held at Headquarters, New York,
on Wednesday, 29 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

Paragraphs 44 to 47

1. Mr. HOLTZMANN (United States of America) suggested that a new sentence should be added at the end of paragraph 44, reading "The terms of reference required under some arbitral rules or agreements of the parties may serve this same purpose."

2. Mr. TELL (France) said that the practice of preparing lists of points at issue, referred to in paragraph 44 was falling out of favour with practitioners. He suggested that the words "risk of a subsequent ultra petita or infra petita objection to the award" should be added to the disadvantages cited in the text.

3. Mr. ABASCAL (Mexico) expressed his support for both the United States proposal and the French proposal.

4. Mr. TELL (France) suggested that in the French text of paragraph 47, the word "recours" should be replaced by "action".

5. Mr. SANDOVAL LÓPEZ (Chile) said that a similar problem existed in the Spanish text, where the words "reparación" and "remedio" should be replaced by "acción".

6. Mr. ABASCAL (Mexico), supported by the CHAIRMAN, said that since the word "acción" had a specific technical meaning in several Latin American countries, it might be inappropriate to use it in paragraph 47.

7. Mr. SANDOVAL LÓPEZ (Chile) said there was nevertheless a need to make it clear that what was being sought was not always a relief or remedy, but rather some action on the part of the tribunal.

8. Mr. HERRMANN (Secretary of the Commission), supported by Mr. ABASCAL (Mexico) and Mr. TELL (France), suggested the adoption of the wording used in other Commission documents, where the phrase "relief or remedy sought" had been translated into French as "l'objet de la demande" and into Spanish as "el objeto de la demanda".

9. Mr. LEBEDEV (Russian Federation) observed that paragraph 47 appeared to concern only the claims of the claimant, and not those of the defendant, and that the secretariat should clarify the draft by avoiding the use of the words "their claims".

10. Mr. HOLTZMANN (United States of America) suggested that, for reasons of clarity and accepted usage, the word "defendant" at the end of paragraph 46 should be replaced by "a party".

11. Paragraphs 44 to 47, as amended, were adopted.

Paragraph 48

12. Mr. GRIFFITH (Australia) suggested that paragraph 48 should indicate more clearly the need for the consent of all parties to the disclosure to the arbitrator of any information relating to the possibility and status of settlement negotiations.

13. Mr. HERRMANN (Secretary of the Commission) said that the purpose of the Notes was not to lay down rules for the parties to arbitration proceedings, but rather to serve as an annotated checklist for the arbitrators. He therefore preferred to preserve the minimalist character of the paragraph as currently drafted.

14. Mr. ABASCAL (Mexico) expressed doubts about the appropriateness of the Australian proposal. Some negotiation agreements might require both parties to provide information to the arbitrators, while others might stipulate confidentiality. The complexity of the problem was beyond the scope of the current paragraph.

15. Mr. HUNTER (United Kingdom) said that in view of the complexity of the issues involved, his delegation also preferred the minimalist approach of the current text.

16. Paragraph 48 was adopted.

Paragraphs 49 to 55

17. Mr. SANDOVAL LÓPEZ (Chile) suggested that part of paragraph 50 should be moved to paragraph 52, so that the first part of the latter paragraph would read "The arbitral tribunal may wish to establish time-limits for the production of documents. In that case, evidence submitted late will as a rule not be accepted."

18. The CHAIRMAN said she took it that the Commission preferred the current text of paragraphs 49 and 50.

19. Mr. HOLTZMANN (United States of America) suggested that, for consistency with other provisions, the words "or electronic message" should be added after the word "telefax" in paragraph 53 (b).

20. Mr. TELL (France) said that while his delegation had no objection to the United States proposal, it found the second part of paragraph 53 to be questionable and too formalistic. As currently drafted, the paragraph appeared to encourage parties to challenge the introduction of documentary evidence.

21. The CHAIRMAN said she took it that the Commission preferred to retain the current wording of paragraph 53, with the addition suggested by the United States representative.

22. Mr. HOLTZMANN (United States of America) suggested that the last sentence of paragraph 54 should be revised to include a reference to a document-numbering system.

23. Mr. HERRMANN (Secretary of the Commission) said that specific reference to a document-numbering system had already been made in paragraph 43, and asked whether a joint set of documents would require a separate numbering system distinct from those already used by the parties to the proceeding.

24. Mr. HOLTZMANN (United States of America) said that perhaps paragraph 43 could be broadened to include a more direct reference to a document-numbering system.

25. Mr. LEBEDEV (Russian Federation) suggested that, in paragraph 43, "a system for numbering items of evidence" should be amended to read "a system for numbering items of evidence and other documents".

26. The CHAIRMAN said she took it that the Commission accepted the amendment suggested by the representative of the Russian Federation.

27. Mr. HUNTER (United Kingdom) said that, the word "findings" in the second sentence of paragraph 55 implied that a decision had been taken. His delegation therefore considered that "findings" should be replaced by a more neutral word, such as "material".

28. The CHAIRMAN said that, if the members of the Commission agreed, the word "findings" in the English text would be replaced by the word "information".

29. Paragraphs 49 to 55, as amended, were adopted.

Paragraphs 56 to 59

30. Mr. HOLTZMANN (United States of America), supported by Mr. HUNTER (United Kingdom), proposed that, in paragraph 58, the words "arrangements so that all parties have the opportunity to be present" should be inserted after the words "matters such as timing,".

31. Mr. MADRID (Spain) said that the current wording of paragraph 58 already implied that measures would be taken to ensure that the arbitrators and one party would be given an opportunity to be present at an on-site inspection.

32. Mr. HUNTER (United Kingdom) said that it was not necessary to imply that the arbitral tribunal had an obligation to make arrangements. The word "arrangements" should therefore be avoided. Perhaps the words "giving the parties an opportunity to be present" would be sufficient.

33. Mr. HERRMANN (Secretary of the Commission) said that, in paragraph 58, the reference to timing and meeting places should take into account the arrangements to which the United States representative was referring. Perhaps the paragraph could be amended to include the words "with a view to ensuring that all parties have an opportunity to be present".

34. Mr. HOLTZMANN (United States of America) said that his delegation could accept the Secretary's suggestion.

35. Paragraphs 56 to 59, as amended, were adopted.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

Paragraphs 60 to 69

36. Mr. HOLTZMANN (United States of America), supported by Mr. GRIFFITH (Australia) and Mr. HUNTER (United Kingdom), proposed that the following sentence should be inserted after the first sentence of paragraph 68: "In those legal systems, it is usual that such contacts are not permitted once the oral testimony of the witness has begun."

37. The CHAIRMAN asked whether the proposed amendment was necessary, considering that the first sentence of paragraph 68 specified that the interviews in question took place "prior to" the hearing.

38. Mr. CHOUKRI (Observer for Morocco) proposed, in keeping with the United States proposal, that the sentence "In some legal systems, the parties are permitted to hold meetings with witnesses prior to their appearance at the hearing" should be added at the end of paragraph 68.

39. The CHAIRMAN said that the Moroccan proposal simply reiterated what was said at the beginning of paragraph 68.

40. Mr. CHOUKRI (Observer for Morocco) said that that paragraph did not cover situations where the parties were permitted to interview witnesses after the hearing had begun but before the witnesses had given their testimony.

41. Mr. HUNTER (United Kingdom) suggested that the Moroccan proposal might be intended to cover situations where witnesses gave evidence before the hearing in the form of a deposition, which was admitted into the record of the proceedings and taken into account by the tribunal in reaching its conclusion. That situation might be too specific for inclusion in the Notes; on the other hand, the Notes should not imply anything negative about that practice.

42. The CHAIRMAN said that the situation was already covered in paragraph 66, and that referring to it again could cause confusion.

43. Mr. HOLTZMANN (United States of America) said that the words "prior to" in the first sentence of paragraph 68 did not convey his idea as explicitly as he would have liked. He suggested that, to replace his previous proposal, the secretariat of the Commission should draft a sentence specifically cautioning the parties that, in systems where witnesses could be interviewed before the hearing, such contacts were usually forbidden once oral testimony had begun.

44. The CHAIRMAN said that the secretariat would take note of the United States proposal.

45. Paragraphs 60 to 69, as amended, were adopted.

Paragraphs 70 to 74

46. Mr. FERRARI (Italy) said that the question of conflicts between different expert opinions which had been raised at the previous meeting, should be dealt with in the section currently under consideration.

47. Mr. LEBEDEV (Russian Federation) said experience had shown that experts were often unable to perform their functions without additional materials from one of the parties, and that many arbitration rules therefore stipulated that the parties must provide experts with the materials they needed to form an opinion. He proposed that the sentence "It may be useful to provide that the parties should supply the expert with the materials he requires to prepare his expert conclusion" should be inserted after the second sentence of paragraph 72.

48. Mr. HERRMANN (Secretary of the Commission) said that, with respect to the proposal by the Russian Federation, the Notes should not specify whether the request for additional materials should come directly from the expert or should be made through the tribunal, since the relevant provisions of the UNCITRAL Arbitration Rules differed from those of the UNCITRAL Model Law on International Commercial Arbitration. He asked the representative of Italy to clarify his proposal, since the Notes could not cover all situations where expert opinions contradicted one another, because the solutions to such contradictions depended on the circumstances in each case and were part of the decision-making process, which was not addressed in the Notes.

49. The CHAIRMAN said she agreed that the choice between different expert opinions was a matter for the judge to decide in each case. In any event, the last sentence of paragraph 72 dealt adequately with the evaluation of experts' reports.

50. Mr. FERRARI (Italy) said that sentence did not sufficiently address the issue because it appeared in the section on the terms of reference of experts appointed by the arbitral tribunal, and not in the section on expert opinions presented by a party.

51. The CHAIRMAN said that the differences of opinion referred to could involve either category of experts. In the absence of specific proposals, she would take it that the Commission approved paragraphs 70 to 74 as amended.

52. Mr. FERRARI (Italy) asked whether the issue he had raised would be addressed.

53. The CHAIRMAN noted that thus far no proposal had been made in that connection, not even by the Mexican delegation, which had raised the issue at the previous meeting.

54. Mr. ABASCAL (Mexico) explained that the problem he had raised concerned conflicts between translations, not conflicts between expert opinions.

55. Mr. FERRARI (Italy) pointed out that the question raised by the Mexican delegation had been postponed precisely because his delegation had suggested

dealing with conflicts between translations and conflicts between expert opinions at the same time.

56. The CHAIRMAN, said that she would take it that the Commission found the paragraphs under consideration sufficiently clear, since no specific amendments had been proposed, apart from the addition to paragraph 72 proposed by the Russian Federation. With regard to the latter proposal, she observed that it might be useful to require the parties to supply the expert with the material necessary for the discharge of his functions.

57. Mr. LEBEDEV (Russian Federation) said he agreed with the Secretary of the Commission that the wording of the addition proposed by his delegation should be extremely general and should do nothing more than clarify certain issues that arose in practice.

58. Paragraphs 70 to 74, as amended, were adopted.

Paragraphs 75 to 86

59. Mr. HOLTZMANN (United States of America) indicating that he was acting on the advice of a group of expert practitioners, suggested adding the sentence "The arbitral tribunal may wish to consult the parties on this matter" at the end of paragraph 76. He also suggested that, in paragraph 81, the words "or when no arbitration rules apply ..." should be added after "In view of such differences ...".

60. Paragraphs 75 to 86, as amended, were adopted.

Paragraphs 87 to 89

61. Mr. HOLTZMANN (United States of America) suggested moving the last sentence of paragraph 89 to the end of paragraph 87. He also suggested that the last part of the sentence should be amended to read "... can be used in multi-party as well as two-party proceedings", which shifted the emphasis.

62. Mr. TELL (France) said that the word "pluripartite" in paragraph 89 of the French text should be changed to "bilatérale" in order to be consistent with paragraph 87.

63. Mr. LEBEDEV (Russian Federation) said that a number of inaccuracies in the Russian text should be corrected.

64. Mr. HERRMANN (Secretary of the Commission) invited all delegations to make suggestions in the other official languages as well.

Paragraphs 32 and 36

65. Mr. SEKOLEC (International Trade Law Branch) read out the following amended version of paragraph 32:

> "It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer

in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the arbitration. Moreover, parties that have agreed on arbitration rules that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize a commitment to confidentiality as an implied term of the agreement. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality."

66. He also read out the following amended version of paragraph 36:

"Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should not be sent by telefax or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document itself is received within a reasonable time thereafter."

The meeting rose at 1.05 p.m.